

Year One: Reflections on Turkey's Legal Responses to the COVID-19 Pandemic

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Ever since the first officially reported COVID-19 case in the country in March in 2020, Turkey, like most of the world, has taken measures to control the pandemic. The measures taken by Turkey included limitations on freedom of movement, closing schools and moving to online teaching at schools as and universities, restrictions on business opening hours, cessation of prison and detention visits, prohibition of resignation for healthcare staff, and, more stringently, the introduction of curfews.

Turkey's legal response to the pandemic has had four key features in the first year. First, these wide-ranging responses have primarily been regulated by centralized executive measures in the forms of presidential circulars, ministerial circulars and public announcements alongside the decisions of provincial public health boards and provincial pandemic boards. Second, restrictions on fundamental rights in Turkey have followed a differentiated response in law and practice. The measures in place have differentiated between individuals based on their ages and between businesses based on the nature of the businesses. The application of measures has also varied in practice: for example, whilst some public gatherings in closed and open spaces have been banned, others were allowed to take place. Third, there has been almost no Parliamentary involvement in, and very limited judicial oversight so far of, these measures. Finally, those who have criticized the legality and the adequacy of the measures have been subject to criminal legal proceedings.

Legal Basis of Turkey's Pandemic Measures

As soon as the first coronavirus case was reported in Turkey in early March 2020, the Government rapidly resorted to wide ranging extraordinary administrative measures. Unlike other countries, in particular those states in the Council of Europe, the Government did not take the path of declaring a state of emergency as provided for under Article 119 of the Constitution. Instead, it relied on the provisions of existing pieces of law, most notably the [Law on Public Health](#) No. 1593 (LPH) and the [Law on Provincial Administration](#) No. 5442 (LPA) to justify the wide range of executive measures restricting fundamental rights.

Under the Turkish Constitution, limitations to constitutional rights must be either enacted directly through an act of Parliament in the shape of a statute or based on the express authorization of such statute. The government's direct and indirect reliance on already existing laws, therefore, have raised questions as to the legal basis of wide-ranging restrictions fundamental rights under the Constitution.

Of these laws, the LPH, dates back to 1930. It is not a piece of law that has seen much practical application in the past ninety years and can best be qualified as 'rusty' to meet a pandemic erupting in 2020. Specifically, the law allows for taking measures with respect to individuals 'who are infected, suspected of being infected, or have been determined to be contagious,' rather than measures affecting the population as a whole. [This has raised concerns](#) as to whether this legislation can be the legal basis of extensive actions restricting constitutional rights by treating everyone as "suspected of being infected" to combat the pandemic.

The Law on Provincial Administration of 1949 — most recently amended in 2018 — on the other hand confers wide ranging powers on Turkish provincial administrative authorities to take all necessary measures to maintain public safety and order, including the power to prohibit anyone (suspected of being a safety danger) from entering and exiting provinces of Turkey for fifteen days, and the power to temporarily close public places. Here, too, it has been noted that treating everyone living in Turkey as a safety danger requires an [extraordinarily broad interpretation](#). Even then, this law does not have a clear legal basis for the authorization of curfews or the imposition of inter-city travel bans for longer periods of time, or to restrict business hours.

Despite these important concerns as to the legal basis of the restrictions as required by the Constitution, Turkey saw the adoption of countless ministerial [circular orders](#) to handle the pandemic. Some of the measures taken cannot be justified in any way under the legal frameworks above. For example, the moratorium on the resignation of healthcare staff is a measure that can only be taken when a state of emergency is declared. However, the governance of the pandemic has so far proceeded by way of adoption of 'state of emergency'-like measures, by way of executive decisions and circulars, despite the explicit Constitutional law requirements in place for the introduction of rights restrictions.

Differentiated Responses Across Age and Risk Groups, Types of Business, Gatherings and Assemblies

The Turkish response to the pandemic so far has been based on the introduction of differentiated measures of rights restrictions, based on the age and vulnerability of individuals. At the start of the pandemic, Turkey became the first country in the world to impose a 24-hour curfew on all individuals over the age of 65. This meant that the population over 65 were unable to leave their homes for weeks on end, even for a short stroll. Subsequently, this differentiated response was recalibrated. Currently, those over 65 are not able to leave their homes save for a three-hour window during the day and they require special permits for inter-city travel. Similar measures have been put in place restricting the movement of individuals under the age of 20. At the same time, Turkey imposed weekend curfews requiring the whole population to remain indoors at the weekends. Whilst the executive circulars make clear who cannot leave their homes, the framework in place for how the state authorities will support those locked in and in need is less clear. This differentiated

response primarily aims to keep the Turkish economy going, as those in the active workforce are not affected by the restrictions. The restrictions also do not apply to restricted age groups if they are members of the workforce.

The authorities have also pursued a differentiated response to business opening hours with the aim of keeping businesses open as much as possible or closing some (such as restaurants and cafes), but keeping others open (such as hotels and shopping malls). Some of these decisions have been criticized on grounds that they favor the wealthy segments of the society. For example, during the winter of 2020, hotels received special exemptions to remain open and admit customers over weekends. This has meant that whilst the whole population was under a curfew and face heavy fines (ranging from 392 to 3.150 TL – roughly 45 to 367 EUR) if they leave their homes, those individuals with reservations in ski resort hotels were exempted from the country-wide weekend curfew.

Differentiation in responses also extended to the enforcement of restrictions in practice. This has been most visible in the case of freedom of assembly. In many instances, authorities issued bans on peaceful protests by rights activists including [lawyers](#), [healthcare workers](#) and [students](#), and arrested protesters. However, despite all the legal restrictions in place, the Turkish Government itself did not shy away from organizing a number of mass gatherings over the past year. The inaugural Friday public prayer in Hagia Sophia after its conversion to a mosque in July 2020 [saw over 350,000](#) people attending. More recently, the ruling Justice and Development Party (AKP) has organized [a large number of party congresses in multiple cities](#), where social distancing rules were not enforced and attendance was praised.

Whilst the legitimate aim of all the enforced differentiated responses is the protection of public health, they all raise questions concerning the proportionality of the measures with the legitimate aim alongside concerns of discriminatory enforcement of rules to government supported activities and others. With regard to the long-term lock-in measures for over 65s, a central question is whether this is the most suitable response to protect individuals from the risk of the pandemic given the risks to physical and mental health posed by long term confinement. As we see in the section below, however, the legal appraisal of these executive measures from the perspectives of legality, proportionality and non-discrimination by Turkish courts has been limited in the first year.

Lack of Legislative Oversight and Limited Judicial Oversight

The pandemic measures in Turkey are marked by the lack of an oversight role for the legislature and the courts. Already with the coming-into-force of Turkey's new presidential system in 2018, which is organized around vast presidential powers at the expense of the other branches of government, there has been regression in the Parliament's legislative and oversight functions. Under the pandemic, this regression of oversight and accountability of the executive deepened. Presidential decrees have been the main mechanisms of rule-making.

One exception to parliamentary activity with respect to the pandemic was the introduction of an early release legislation to reduce the chronic overcrowding in Turkey's prisons. But this law deliberately excluded thousands of prisoners charged under overly broad terrorism offences. [The law was passed in April 2020](#) without any significant amendments despite persistent calls from opposition parties and civil society groups to broaden its scope.

There has not been a flurry of legal challenges before Turkish courts regarding the wide-ranging measures taken to address the pandemic in the first year. An individual application ([Senih Özay](#)) lodged before the Turkish Constitutional Court (TCC) challenging the legal basis of the pandemic-related curfews imposed on citizens over 65 was found inadmissible in June 2020. In its decision, the TCC noted that curfew in its nature is an administrative measure and that the applicant should seek remedy before the administrative courts. As [reported in Turkish media](#) in January this year, an Istanbul-based association has now turned to the Istanbul Administrative Court for the annulment of the curfew on senior citizens alleging its conflict with Article 23 of the Turkish Constitution (freedom of movement).

Some individuals, however, have successfully challenged the hefty fines imposed on them by the police for breaking COVID-19 rules on the ground that these fines lacked a clear legal basis. For example, in one case, [the Turkish Court of Cassation](#) struck out an administrative fine imposed by the police on an individual for allegedly breaking COVID-19 rules by not wearing a mask on the ground that they do not possess such authority under the provisions of LPH and the LPA in conjunction with the Turkish Misdemeanor Law. Invoking this decision, a [Turkish peace court](#) later invalidated another fine issued by the police to an individual for breaching the curfew rules. These decisions, however, do not alter the fine regime, but merely instruct the executive to point to other legal provisions when issuing fines.

A key area of administrative law litigation was the central government's decision to limit the ability of the mayors of the three metropolitan cities of Turkey — Istanbul, Ankara and Izmir, respectively — to maintain local services and distribute social assistance to those in need due to COVID. Significantly, these mayors are all members of the opposition party, CHP. Several initiatives taken by the CHP mayors to fundraise for families-in-need affected by the lockdown received harsh criticism by President Erdogan, who accused the mayors of trying to create 'a state within a state'. Following the president's cue, in an effort to prevent opposition municipalities from raising funds, the Turkish Interior Ministry issued [another circular](#), banning the fundraising campaigns, blocking the collected funds in state-owned banks and informing the CHP mayors that they need clear authorization from local governors to carry out COVID-related social projects. The opposition mayors petitioned the [Turkish Council of State](#) (TCS) requesting for an order of stay of execution of this circular, however the TCS dismissed the request. The Court is expected to issue a full judgment in this case later this year. This litigation points to the lack of intolerance to any positive measures that are not co-ordinated by the ruling party through the new presidential system.

Criminalization of Responses to Criticism of Measures Taken and Increase in Rights Restricting Laws

Since March 2020, there have been increasing concerns as to how COVID-19 has been handled in Turkey. [The contradicting numbers](#) released by Government officials and the [under-reporting of coronavirus cases/deaths](#) have raised serious concerns alongside government's the organization of or attendance to super spreader events. The Turkish government put considerable effort into containing the flow of information about the level of COVID-19 cases and targeted those who challenged the government's official line on the pandemic. Under the guise of combating 'fake news', 'incitement' or 'spreading fear and panic', hundreds of individuals including [social media users](#), [journalists](#), [doctors](#), and others who were discussing the pandemic responses online have been investigated pursuant to criminal law provisions including under Article 213 (threats to create fear and panic among the people), Article 216 (public incitement to enmity and hatred) and Article 217 (public incitement to break the law) of the Turkish Criminal Code.

Looking Ahead

The impacts of the strategy of keeping risk groups, the elderly and children off the streets, (whilst keeping the workforce on the streets) on the full range of the enjoyment fundamental rights, including the impacts on right to health, right to education, women's rights, rights of the elder persons alongside intersectional forms of discrimination in is yet to be fully studied in Turkey. There is some evidence that there has been a rise in domestic violence, the data of the [Istanbul Security Directorate](#) in mid-2020, for example, revealed a 32.8% increase in domestic violence compared to 2019. The impact of lack of Internet access or proper technological devices on the right to education, in particular of those children coming from lower socio-economic backgrounds also is a major concern in the face of different remote learning policies adopted by the Turkish Ministry of Education (for additional problems, see [here](#)). [According to a recent report](#), the number of students who lack access to 'remote education' stands at 6 million – around one third of Turkey's student population. Whilst the positive impacts of the rollout of CoronaVac vaccine, developed by the Chinese vaccination firm Sinovac, since 14 January 2021 are keenly awaited to return to some sense of normalcy, there have also been [transparency concerns](#) as to Turkey's choice of a single vaccine roll out.

Overall, the pandemic in the first year has been a magnifying glass of the ongoing process of executive aggrandizement in Turkey under its new Turkish style presidential system. This was reflected not only in the means and methods used to fight the pandemic determined centrally by the executive team of the President with no or very limited oversight by the parliament, courts, but also in the selective application of rules to the government and its critics and legal harassment of those, including doctors and health workers, who have criticized the measures taken and asked for more transparency. In addition, whilst the Parliament was sidelined

in addressing the pandemic, it has been active in introducing a wide range of laws restricting rights in contexts not related to the pandemic in the first year. For example, [one piece of legislation](#) adopted in summer 2020 tightened governmental grip over social media platforms — allowing state authorities to remove content from these platforms (rather than blocking) and requiring social media giants to appoint a local representative to address authorities' concerns. At the end of 2020, the Parliament further approved a law, which places [onerous oversight rules](#) on civil society organizations, including on the ability of the Turkish Internal Ministry to replace the leaders of such organizations who face terrorism charges. As the first year of the pandemic comes to an end, a post pandemic normalcy does not bode well for fundamental rights and rule of law.

